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No. 90-463

In the Supreme Court of the United States

OCTOBER TERM, 1990

BETTY D. MCCALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the courts below correctly held that petitioner, who has been compensated for her injuries under the Federal Employees Compensation Act, may not sue the government under the Federal Tort Claims Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12-19) is reported at 901 F.2d 548. The district court's order (Pet. App. 20-22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1990. A petition for rehearing was denied on June 17, 1990. Pet. App. 56-57. The petition for a writ of certiorari was filed on September 17, 1990.

STATEMENT

1. In June 1981, petitioner, a civilian employee at the Wright-Patterson Air Force Base, slipped on some stairs in an office on the base and fractured her hip. She was taken to the Base Medical Center, where she had an operation.[1] She was treated as an inpatient for one month and later on an outpatient basis. In September 1981, she underwent surgery for a second time, allegedly on account of prior negligent treatment. Pet. App. 12-13.

Petitioner filed a claim with the Department of Labor for benefits under the Federal Employees Compensation Act (FECA). She was granted total disability compensation for the period from July 26, 1981, to May 9, 1983, and partial disability compensation from May 9, 1983, to August 23, 1983. Her benefits were then terminated, but petitioner administratively appealed that decision and the Department of Labor restored her FECA compensation from August 26, 1983, forward. Pet. App. 13.

In 1984, petitioner brought this action under the Federal Tort Claims Act (FTCA) seeking compensation for alleged medical malpractice by doctors at the Medical Center in connection with the initial surgery on her hip and the rehabilitation treatment she received. The district court granted the government's motion for summary judgment. It found that petitioner had received compensation under FECA for injuries sustained as a result of the alleged malpractice. Since FECA's remedies are exclusive,[2] the

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[1] Petitioner was entitled to treatment at the Medical Center both because the injury occurred in the course of her employment and because she was a dependent spouse of a deceased member of the armed services. Pet. App. 13.

[2] The statute provides that "[t]he liability of the United States * * * under this subchapter * * * with respect to the injury * * * of an employee is exclusive and instead of all other liability of the United States

court dismissed petitioner's FTCA action. Pet. App. 26-27.

The court of appeals affirmed. Pet. App. 12-19. It first observed that FECA's exclusivity provision embodies the typical compromise found in workers' compensation legislation—employees are entitled to guaranteed benefits, but they lose their right to sue their employer in tort. Pet. App. 14-15. The court further observed that the determination whether or not a particular injury is compensable under FECA is within the sole discretion of the Secretary of Labor, whose determinations are unreviewable. *Id.* at 15. It then noted that the district court had found that petitioner had received compensation under FECA for her injuries, including those suffered as a result of the alleged medical malpractice. *Ibid.* Specifically, the court noted that the record indicated that the Department of Labor "paid numerous bills for medical services, including the second surgery performed to correct the results of the original surgery." *Id.* at 16. Because federal courts lack subject matter jurisdiction where there is even a substantial question of FECA coverage, the court held that the award of benefits to petitioner under FECA showed that there was, at the least, a question of FECA coverage here. *Id.* at 19.

ARGUMENT

Petitioner acknowledges (Pet. 6) that a number of courts of appeals have held that FECA covers not only an initial injury but also additional injuries caused by negli-

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* * * to the employee * * * or any other person entitled to recover damages from the United States * * * because of the injury * * * in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute." 5 U.S.C. 8116(c).

gent treatment of the first injury, and that malpractice claims are accordingly barred. See *Baker* v. *Barber*, 673 F.2d 147, 150 (6th Cir. 1982); *Gold* v. *United States*, 387 F.2d 378 (3d Cir. 1967); *Balancio* v. *United States*, 267 F.2d 135 (2d Cir.), cert. denied, 361 U.S. 875 (1959); see also *Wilder* v. *United States*, 873 F.2d 285 (11th Cir. 1989). Petitioner suggests that review by this Court is warranted on account of an intra-conflict between the decision below and the Sixth Circuit's decision in *Wright* v. *United States*, 717 F.2d 254 (1983).

As an initial matter, the court of appeals reasonably distinguished its prior decision in *Wright*. It noted that its holding there "was based on the 'unique circumstances' of the case." Pet. App. 18-19; see 717 F.2d at 260. In *Wright*, the court explained, the plaintiff was injured at the workplace but her injury, a ruptured tubal pregnancy, was not work-related. Pet. App. 18. Furthermore, the malpractice complained of in *Wright* resulted in an alleged injury wholly separate and distinct from the injury for which the plaintiff was being treated. *Ibid.* In contrast, as the court of appeals concluded, petitioner's "initial injury was clearly suffered in the performance of her duties" and "[t]he alleged malpractice injury was closely related to the initial injury." *Id.* at 19. In addition, unlike the plaintiff in *Wright*, petitioner actually received compensation under FECA on account of the alleged malpractice. *Ibid.*

In any event, intra-circuit conflicts do not justify review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

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